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No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

O.R. ADAMS JR.
320 Gold Ave., S.W.
Suite 1026
Albuquerque, N.M. 87102
(505) 242-5226

Attorney for Respondents, Gallup Sales Co., Pucci Distributing Co., Pecos Sales Co., and State Beer Distributors, Inc.

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REASON FOR SUPPLEMENTAL BRIEF

On January 22, 1992, the United States Supreme Court decided the case of *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119. This case is critically important in reinforcing the position of the respondents that the petition for writ of certiorari should be denied because the prior decision of the United States Supreme Court in this case decided the federal issue against the Respondent, and under the law of the case doctrine as stated by this Court, the issue decided should not be re-litigated.

This case was not available when the respondents' brief was written.

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ARGUMENT

I. THE PETITION SHOULD BE DENIED ON THE LAW OF THE CASE OF THIS COURT.

On page 6 of its Reply Brief, Stroh noted that on January 22, 1992, in *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, this Court declined to reverse an earlier summary decision it had made in the same case. However, Stroh failed to note that a stated basis of the decision was this Court's law of the case doctrine. Writing for the majority, Justice White stated:

> . . . Although we have been reluctant to import wholesale law-of-the-case principles into original actions, *Arizona v. California*, 460 U.S. 605, 618-619 (1983), prior rulings in such cases "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." (60 U.S.L.W. 4122)

The principles stated and followed in this latest case are on all fours with the law of the case issue in our case, and fully support our argument that the constitutional issue decided in this case, twice by the New Mexico Supreme Court, and once by this Court, should not be the subject of still further litigation. The statement in the case that if the Court was convinced that its prior decision accepting jurisdiction was clearly wrong, it would not hesitate to reverse it, in no way detracts from these principles, nor does it detract from the import of *Arizona v. California*, 460 U.S. 605, 75 L.Ed.2d 318, 103 S.Ct. 1382 (1983), cited and followed in the case.

In fact, the implication of the Court's statement that it would not be inclined to reverse its prior decision in the case on jurisdiction unless it was convinced that it was "clearly wrong" adds to the strength of our case. The question of jurisdiction ordinarily may be raised and attacked at any time. It may be raised for the first time on appeal and may even be collaterally attacked. This was one of the bases stated in support of the position of Justice Scalia in the dissenting opinion, joined in by Chief Justice Rehnquist and Justice Thomas. As to the question of jurisdiction and standing, the prior decisions were relied on by the majority and not further considered in

the opinion and ultimate decision in the case, other than as noted above.

In *Arizona v. California*, supra, Justice White, for the majority, rather clearly stated the law of the case doctrine of this Court, and this is still the applicable law. The opinion states:

> . . . As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. * * * (460 U.S. 618)
>
> * * *
>
> Under the law of the case doctrine, as now commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. * * * (Footnote 8, 460 U.S. 618)
>
> * * *
>
> First, while the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. * * * Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. * * * (460 U.S. 619)
>
> * * *
>
> We also fear that the urge to relitigate, once loosed, will not be easily cabined. * * * These considerations, combined with practice in our

> original cases and the strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated. (460 U.S. 625-626)

Justice Brennan, with whom Justices Blackmun and Stevens concurred, wrote an opinion concurring in part and dissenting in part in *Arizona v. California*. They concluded that a manifest injustice would result if the prior ruling were not reconsidered. They nevertheless agreed with the law of the case doctrine stating: "In the absence of some overriding reason, a court should be reluctant to reopen that which has been decided merely to correct an error, even though it has the power to do so." (460 U.S. 644)

It is now abundantly clear that the present law of the case doctrine, as applied by this Court, is actually no different than the law of the case doctrine in New Mexico, and as applied by the New Mexico Supreme Court in this case. Two things must be shown before a prior decision in the same case should be overturned; first that it was clearly erroneous, and, secondly, that a manifest injustice would otherwise result. The record shows no change of circumstances that would work a manifest injustice, other than against the respondents if the prior decisions were not followed, and there was certainly no change of law during the period for which the overcharges were determined. The New Mexico Supreme Court correctly decided both of those issues in favor of the respondents, and the federal constitutional issue was merely collateral in determining whether the first decision was wrong when it was decided.

Stroh calls the Court's decision in our case a "summary" decision, but it also acknowledges that the prior decision considered in *Wyoming v. Oklahoma*, supra, was a summary decision. However, this Court's decision in our case was certainly a considered decision, as Justice Stevens wrote a comprehensive concurring opinion on the constitutional issue. *United States Brewers Assn., Inc., v. Director of the New Mexico Dept. of Alcoholic Beverage Control*, 100 N.M. 216, 688 P.2d 1093 (1983), appeal dismissed, 465 U.S. 1093, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). It is the exact same issue which Stroh is now trying to re-litigate, after two decisions against it by the District Court, two decisions against it by the New Mexico Supreme Court, and the decision against it on the same issue by the Supreme Court of the United States. If this is not a case to apply finality and repose under the law of the case doctrine, then it is hard to imagine one that is.

CONCLUSION

This Court has previously decided that this case did not present a substantial federal question. That issue should not be re-litigated at this late date.

In addition, all equities have been determined against Stroh.

The basic and overriding issue in this case is simply whether or not the subject price discrimination law was in effect in New Mexico during the period for which the

overcharges were determined. It is beyond any reason and justice to say that it was not.

Respectfully submitted,

O.R. ADAMS, JR.
320 Gold Ave., S.W.
Suite 1026
Albuquerque, New Mexico 87102
(505) 242-5226

Attorney for Respondents,
Gallup Sales Co.,
Pucci Distributing Co.,
Pecos Sales Co., and
State Beer Distributors, Inc.